# STATE OF MICHIGAN

# COURT OF APPEALS

SHAWN POCSI,

Plaintiff-Appellee/Cross-Appellant,

and

MATTHEW POCSI,

Plaintiff,

v

DEANNA L. LOWRY-JENSEN, Individually and as Personal Representative of the Estate of ROCK R. JENSEN, Deceased,

Defendant-Appellant/Cross-Appellee.

UNPUBLISHED
October 20, 2005

No. 251367
Newaygo Circuit Court
LC No. 01-018252-NI

Before: Cooper, P.J., and Bandstra and Kelly, JJ.

PER CURIAM.

Defendant[1] appeals as of right from an order of judgment entered pursuant to a jury verdict in favor of plaintiff Shawn Pocsi in this negligence action.[2] Defendant asserts that the trial court erroneously determined that she, as the insured of an insolvent insurance company, was not entitled to a credit against the judgment pursuant to the "credit" provision of the Property and Casualty Guaranty Association Act (PCGAA).[3] On cross-appeal, plaintiff contends that the trial court improperly denied her motion for a new trial or additur. We affirm.

[1] For ease of reference, we will refer to Deanna L. Lowry-Jensen, both personally and in her capacity as the personal representative of the defendant estate, as the singular defendant.

[2] As the claims of Matthew Pocsi are derivative in nature, we will refer to Ms. Pocsi as the singular plaintiff.

[3] MCL 500.7901 *et seq.*

## I. Factual Background

On October 9, 2000, a vehicle driven by defendant's husband, Rock R. Jensen, crossed the centerline and collided with an oncoming vehicle driven by plaintiff. Mr. Jensen was killed in the collision and plaintiff sustained serious bodily injuries.[4] Plaintiff filed suit against defendant in her capacity as the personal representative of Mr. Jensen's estate, and also individually as the joint owner of the vehicle driven by Mr. Jensen pursuant to MCL 257.401.[5] At the time of the accident, and when plaintiff filed her complaint, defendant was insured under a no-fault automobile insurance policy issued by Reliance Insurance Company (Reliance). The limit of third-party liability coverage under defendant's policy with Reliance was $100,000.

On October 3, 2001, a Pennsylvania court declared Reliance insolvent and placed the company into liquidation. In accordance with the PCGAA, the declaration of insolvency triggered the statutory duty of the Michigan Property and Casualty Guaranty Association (MPCGA)[6] to pay any obligations of Reliance coming within the act's definition of "covered claims."[7] Pursuant to its statutory duty, the MPCGA took over the defense of this suit.[8]

After Reliance became insolvent, plaintiff received $100,000 in uninsured motorist (UM) benefits from her own no-fault policy issued by Liberty Mutual. Defendant sought partial summary disposition, contending that she was entitled to a credit in that amount against any judgment awarded pursuant to MCL 500.7931(3). Plaintiff asserted that only the MPCGA would be entitled to a credit against a covered claim, not an individual defendant. The trial court declined to rule on defendant's motion as it would not be ripe for review until plaintiff's damages had been determined at trial. However, the court indicated that it was inclined to rule in plaintiff's favor on this issue.

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[4] Plaintiff's injuries included multiple fractures and other injuries to her legs and feet, lacerations to her face, a closed head injury, and contusions to her chest. Plaintiff was confined to a wheelchair for two months and underwent numerous surgeries to repair her ankles and knees.

[5] MCL 257.401(1) provides in relevant part:

> The owner of a motor vehicle is liable for an injury caused by the negligent operation of the motor vehicle. . . . The owner is not liable unless the motor vehicle is being driven with his or her express or implied consent or knowledge. It is presumed that the motor vehicle is being driven with the knowledge and consent of the owner if it is driven at the time of the injury by his or her spouse . . . .

[6] The MPCGA is an association of all property and casualty insurers authorized to conduct business in Michigan. MCL 500.7911(1); *Oakland Co Bd of Co Rd Comm'rs v MPCGA*, 456 Mich 590, 593-594; 575 NW2d 751 (1998) (*Oakland Co II*).

[7] MCL 500.7931(1).

[8] See *Metry, Metry, Sanom & Ashare v MPCGA*, 403 Mich 117, 119; 267 NW2d 695 (1978).

Following trial, the jury entered a special verdict in plaintiff's favor awarding her $33,659.74.[9] Plaintiff filed a motion for a new trial or additur, which the court denied. Defendant filed a motion for entry of judgment, again seeking to set off the $100,000 in UM benefits from the judgment against her. The trial court rejected defendant's contentions and entered judgment against her in the full amount of the jury award.

## II. Credit Provision of the PCGAA

On appeal, defendant challenges the trial court's determination that she was not entitled to a credit in her favor pursuant to MCL 500.7931(3), as a party previously insured by an insolvent insurer. We review issues of statutory construction de novo.[10] We may not "'impos[e] different policy choices then those selected by the Legislature.'"[11] Our primary goal is to ascertain and give effect to the intent of the Legislature.[12] When a statute's language is unambiguous, we must assume that the Legislature intended its plain meaning and enforce the statute as written.[13] It is only when the statutory language is ambiguous that we may look beyond the statute to determine the Legislature's intent.[14]

> The [PCGAA] is designed to protect from potentially catastrophic loss persons who have a right to rely on the existence of an insurance policy—the insureds and persons with claims against the insureds. Persons in such categories are relatively helpless with regard to the insolvency of an insurer. They are not likely to be in a position to evaluate the financial stability of the insurance company and they have no control over the time at which their claims arise.[15]

However, the MPCGA does not step into the shoes of the insolvent insurance company.[16] It is the insurer of last resort; a claimant or policy holder must first exhaust available coverage under other valid insurance policies before the MPCGA will become involved.[17] To that end, the credit provision of the PCGAA provides:

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[9] After the addition of costs, fees, sanctions, and interest, the total final judgment amounted to $49,145.40.

[10] *Eggleston v Bio-Medical Applications of Detroit, Inc*, 468 Mich 29, 32; 658 NW2d 139 (2003).

[11] *People v McIntire*, 461 Mich 147, 152; 599 NW2d 102 (1999), quoting 232 Mich App 71, 119; 591 NW2d 231 (1998) (Young, J., dissenting).

[12] *Weakland v Toledo Engineering Co*, 467 Mich 344, 347; 656 NW2d 175 (2003).

[13] *McIntire*, *supra* at 152.

[14] *DiBenedetto v W Shore Hosp*, 461 Mich 394, 402; 605 NW2d 300 (2000).

[15] *Metry*, *supra* at 121.

[16] *AAA v Meridian Mut Ins Co*, 207 Mich App 37, 40-41; 523 NW2d 821 (1994); *Yetzke v Fausak*, 194 Mich App 414, 422; 488 NW2d 222 (1992).

[17] *AAA*, *supra* at 41; *Yetzke*, *supra* at 422.

> If damages or benefits are recoverable by a claimant or insured under an insurance policy other than a policy of the insolvent insurer, or from the motor vehicle accident claims fund, or a similar fund, the damages or benefits recoverable shall be a credit against a covered claim payable under this chapter. . . . An insurer or a fund may not maintain an action against an insured of the insolvent insurer to recover an amount which constitutes a credit against a covered claim under this section. An amount paid to a claimant in excess of the amount authorized by this section may be recovered by an action brought by the association.[18]

"Covered claims" are defined in relevant part as:

> [O]bligations of an insolvent insurer which meet all of the following requirements:
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> (a) Arise out of the insurance policy contracts of the insolvent insurer issued to residents of this state or are payable to residents of this state on behalf of insureds of the insolvent insurer.
>
> (b) Were unpaid by the insolvent insurer.
>
> (c) Are presented as a claim to the receiver in this state or the association on or before the last date fixed for the filing of claims in the domiciliary delinquency proceedings.
>
> (d) Were incurred or existed before, at the time of, or within 30 days after the date the receiver was appointed.
>
> (e) Arise out of policy contracts of the insolvent insurer issued for all kinds of insurance except life and disability insurance.
>
> (f) Arise out of insurance policy contracts issued on or before the last date on which the insolvent insurer was a member insurer.[19]

The MPCGA provides coverage for individuals with insurance policies issued by providers that have since become insolvent.[20] The PCGAA proscribes the duties of the MPCGA with respect to these individual insureds. A judgment entered against an individual insured becomes a covered claim for the *insured* once she seeks indemnification from the MPCGA. However, a claim for judgment by an injured third-party for which an individual insured becomes personally liable is not a covered claim under the PCGAA.

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[18] MCL 500.7931(3).

[19] MCL 500.7925(1)(a).

[20] MCL 500.7704(1).

The Michigan Supreme Court has determined, in similar circumstances, that claims which an insolvent insurer is obligated to pay on behalf of an insured are not covered claims within the PCGAA's definition. In *Oakland Co Bd of Co Rd Comm'rs v MPCGA*, this Court determined that the net worth exclusion to the definition of covered claim[21] applies to third-party claimants, as well as to insureds, as the "claim constitutes an obligation of an insolvent insurer that is payable to a Michigan resident on behalf of an insured of the insolvent insurer."[22] The Supreme Court disagreed that Oakland County's then-insolvent general liability carrier, Midland Insurance Company, had an "obligation" to the third-party claimants:

> What, then, is an obligation of the insurer? Basic principles of insurance law provide that an insurance policy is a contract and that the insurer's obligations under that contract include the duty to indemnify and the duty to defend.[6] Midland's obligations to defend and to indemnify were to its insured, the road commission. The road commission confuses "obligation to" with "payable to." Under the insurance policy, Midland's contractual obligations ran to its insured, the road commission. That Midland might *pay* third parties, directly or indirectly, is irrelevant.[7] We note that the road commission has not argued that, under the contractual language of the insurance policy, Midland owed any obligations to any third parties under any circumstances. Application of the act cannot change the nature of the contractual insurance relationship or insert provisions or obligations into the contract not before in existence.
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> [6] Generally, an insurer has a duty to defend its insured and a duty to indemnify its insured; however, we must emphasize that such duties arise from the policy language . . . .
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> [7] The Court of Appeals held that "because plaintiff's claims arise from its liability to third parties, the net worth exclusion . . . must be applied to plaintiff and to plaintiff's third-party claimants." 217 Mich App 160. We disagree. The road commission's claims under the act arise out of its contract for insurance with Midland that provided indemnification for these third-party claims. Only because of the existence of the contract of insurance does the road commission have a claim under the act.[23]
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[21] MCL 500.7925(3).

[22] *Oakland Co Bd of Co Rd Comm'rs v MPCGA*, 217 Mich App 154, 159; 550 NW2d 586 (1996) (*Oakland Co I*).

[23] *Oakland Co II*, *supra* at 600-601.

In this case, plaintiff filed suit against defendant, not against defendant's insurer.[24] The duty of Reliance, and of the MPCGA, was to defend and indemnify defendant pursuant to the no-fault insurance policy. Neither Reliance nor the MPCGA had a contractual relationship with plaintiff obligating it to provide coverage to plaintiff. It is not disputed that, had Reliance remained solvent, it would have paid the amount of the judgment to plaintiff on behalf of defendant. This duty to indemnify, however, ran to the insured, not to the third-party claimant. Defendant cannot claim a credit against that judgment and plaintiff is entitled to collect the judgment in her favor in its entirety. Accordingly, the trial court properly denied defendant's motion for entry of judgment reflecting the requested credit.[25]

III. Motion for Additur or New Trial

On cross-appeal, plaintiff challenges the trial court's denial of her motion for new trial or additur. The jury awarded plaintiff $33,659.74, comprised of $16,000 for past noneconomic damages, and $17,659.74 for future noneconomic damages. However, the jury awarded nothing for plaintiff's future lost wages. Plaintiff contends that, due to the severity of her injuries and their effect on her life, the jury's award of future economic and noneconomic damages was so deficient that the trial court abused its discretion in denying her motion. We review a trial court's decisions regarding a motion for a new trial or additur for an abuse of discretion.[26] A new trial may be granted where a verdict is "clearly or grossly inadequate" or where a verdict is "against the great weight of the evidence or contrary to law."[27] If the only error in the trial is the inadequacy of the verdict, the trial court may deny a motion for new trial on the condition that the nonmoving party consent to additur to the lowest amount the evidence will support.[28]

In determining whether a new trial or additur is appropriate, a trial court must decide whether the jury award was supported by the evidence.[29] However, the court should not

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[24] Had plaintiff named Reliance, and thereafter the MPCGA, as a defendant in this action, the MPCGA potentially would have been entitled to a credit in the amount of the UM benefits received by plaintiff. See *Yetzke*, *supra* (applying the credit provision to the plaintiff's judgment when the plaintiff included the defendant's insurance company and, later, the MPCGA as defendants in the lawsuit).

[25] We note, however, that the MPCGA has a duty to indemnify defendant for the judgment against her in its entirety. Defendant has not recovered the amount of the judgment against her from another insurance policy or claims fund.

[26] *Kelly v Builders Square*, 465 Mich 29, 34; 632 NW2d 912 (2001); *Palenkas v Beaumont Hosp*, 432 Mich 527, 533; 443 NW2d 354 (1989).

[27] MCR 2.611(A)(1)(d) and (e).

[28] MCR 2.611(E)(1).

[29] *Henry v Detroit*, 234 Mich App 405, 415; 594 NW2d 107 (1999).

substitute its judgment for that of the jury.[30] The court should limit its inquiry to objective considerations such as:

> [1] whether the verdict was the result of improper methods, prejudice, passion, partiality, sympathy, corruption, or mistake of law or fact; [2] whether the verdict was within the limits of what reasonable minds would deem just compensation for the injury sustained; [and (3)] whether the amount actually awarded is comparable to awards in similar cases within the state and in other jurisdictions."[31]

The jury's determination to deny plaintiff future economic damages was supported by the evidence. A plaintiff must take reasonable actions under the circumstances to minimize the economic damages caused by the wrongdoer.[32] The defendant bears the burden to establish that the plaintiff failed to make reasonable efforts to mitigate damages by seeking available, similar employment.[33] Plaintiff, who was forty-one years old, worked twenty-five hours a week as a preschool teacher earning $6.50 an hour at the time of the accident. She and her husband also bred horses; however, that business had not yet made a profit. Both plaintiff and her husband testified that she was no longer able to meet the physical demands of either job. However, plaintiff had worked in various fields in the past, had attended business school, and received training in accounting. Furthermore, plaintiff's orthopedic surgeon testified that she was not totally disabled and could work at a sedentary job. Yet, plaintiff established by her own testimony that she made no effort to seek such employment. Based on this evidence, the jury's failure to award plaintiff any future economic damages "was within the limits of what reasonable minds would deem just compensation for the injury sustained."

There is no absolute standard by which to measure a plaintiff's noneconomic damages.[34] Plaintiff undoubtedly suffered a significant amount of pain following this serious accident. She underwent several surgeries to repair her ankles and knees and continued to take prescription pain medication by the time of trial. She suffered trauma to her chest, leading to a deformity in her right breast.[35] Plaintiff testified that she suffers from depression and anxiety and has difficulty walking. However, we have only the written record of these proceedings before us. We must defer to the trial court's denial of additur as the trial judge "has presided over the whole trial, has personally observed the evidence and witnesses, and has the unique opportunity to evaluate the jury's reaction to the witnesses and proofs."[36] Further, the jury "had ample

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[30] *Palenkas, supra* at 534.

[31] *Id.* at 532-533.

[32] *Morris v Clawson Tank Co*, 459 Mich 256, 263; 587 NW2d 253 (1998).

[33] *Id.* at 266.

[34] *Meek v Dep't of Transportation*, 240 Mich App 105, 122; 610 NW2d 250 (2000).

[35] Plaintiff's general surgeon testified that the injury to plaintiff's chest was not life threatening, but could only be corrected by a mastectomy.

[36] *Palenkas, supra* at 534.

opportunity to evaluate the testimony and credibility of the witnesses" and we must defer to their verdict.[37]

Accordingly, the trial court did not abuse its discretion in denying plaintiff's motion for additur or a new trial. The jury did grant plaintiff an award for future noneconomic damages, and there was no indication that the jury's verdict was influenced by any improper consideration. We will not substitute our judgment for that of the jury.

Affirmed.

/s/ Jessica R. Cooper
/s/ Richard A. Bandstra
/s/ Kirsten Frank Kelly

[37] *Moore v Spangler*, 401 Mich 360, 380; 258 NW2d 34 (1977).